11-23-2012

Sun Sur. Ins. Co. v. District Court of Fourth Judicial Dist. Of State Appellant's Reply Brief Dckt. 39791

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BEFORE THE IDAHO SUPREME COURT

SUN SURETY INSURANCE, COMPANY, Plaintiff, vs. THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO; MICHAEL E. WETHERELL, in his official capacity as Administrative District Judge; LARRY D. REINER, in his official capacity as Trial Court Administrator; and DIANNE BURRELL, in her official capacity as Assistant Trial Court Administrator, Defendants.	)	SUPREME COURT CASE NO. 39791

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District, In and For the County of Ada

HONORABLE RON D. SCHILLING, PRESIDING.

Honorable Lawrence Wasden
Attorney General, and
Clay R. Smith
P.O. Box 83720, Boise
Respondent's Attorney

David H. Leroy
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Appellant's Attorney

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1. That Sun Surety has no right to bring an independent civil proceeding to seek bail forfeiture relief because such an action is not specifically referenced in the text of Idaho Code Section 19-2927.

2. Only a direct appeal may consider this issue, because the relief of bond forfeitures are solely an exercise of "discretion" by the District Court.

3. The requirement of a separate civil enforcement action to collect on a forfeiture of a prosecutor previously under then-effective Idaho Code Section 19-2928 did not imply or permit the filing of a like action to avoid forfeiture by a surety.

4. To permit an independent action improperly extends the one hundred and eighty day filing limit and avoids other applicable rules for seeking exoneration.

5. Judge Schilling was correct in dismissing the case on the basis of claim preclusion and Res Judicata principles.

The Appellant disputes each of those contentions as noted herein and as anticipated by its previously filed opening Brief.

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V. JUSTICE SHOULD NOT REQUIRE OR PERMIT FORFEITURE HEREIN.

I.

THE APPELLANT AGREES THAT "THE RIGHT TO RELIEF FROM FORFEITURE OF BAIL IS GOVERNED BY STATUTE."

At Page 7 of its brief, the Respondent commences its argument, citing two cases for the proposition that "the right to relief from forfeiture of bail is governed by statute." State v. Overby, 90 Idaho 41, 44 408 P 2d 155, 156 (1965) so held on facts where the surety untimely filed a motion to exonerate the bond. State v. Mayer, 81 Idaho 111, 338 P 2d 270 (1959) was the seminal Idaho case for that proposition, citing California and Colorado authority and two treatises.

Using those cases, the Respondent urges the Court to conclude that since Idaho Code Section 19-2927 does not specifically mention or authorize an independent action to avoid forfeiture, such as is brought by Appellant here, the silence of the statute must necessarily ban such an effort. This Appellant contends the Court should instead focus its language review upon the applicable portions of Idaho Code Section 19-2927, as it was in effect in November 2008, which provided that "failure to give timely notice shall exonerate bail." (emphasis added) The law is not silent on that point.

As is urged at pages 10 and 11 of the Appellant's Brief, the clerk's failure to give notice itself acts to mandate the exoneration of the bond, if that language is deemed to be self-executing. A hearing before Judge Neville or Judge Shilling should be held to confirm the defect of the notice. This could allow the judicial system to conform procedure with the mandate of the statute and allow the award of the relief sought by Sun Surety.

As noted in the Appellant's Opening Brief, Sun Surety believes that in some form, before some court, as a matter of a affirmative relief or in defense to a future collection action, it is entitled to a finding of fact and a ruling of law that the insufficient performance of the Ada County Clerk has terminated the obligation owing on the Bailey bond. It is that portion of the text of the statute which this Court should first consider under the precedent that statutes govern the right to relief on forfeiture of bail. Only subsequently, should this Court consider whether the "silence" of the statute about independent actions precludes them. This Appellant thinks not, as discussed below.

II.

THE TEXT OF IDAHO CODE SECTION 19-2927 DOES NOT FORECLOSE AN INDEPENDENT CIVIL ACTION FOR FORFEITURE RELIEF.

The Idaho Code at the time of both Oberby and Mayer established as typical practice the filing of a motion before the original criminal court judge within a specific period of time in order to seek a discretionary ruling to absolve a forfeiture. The statutory text did not make any reference to an independent action being filed either within or after that period. However, neither did the statutory language specifically prohibit such an action, early filed or late.

The Respondents cite no precedent or ruling to support the holding that silence is a bar. They simply urge that since the most common process by which these cases reach the Supreme Court is direct appeal from criminal court rulings, that such an appeal must be the exclusive process permitted. (Respondents' Brief, page 8, paragraph 1), Idaho has not directly reached this issue.

However, the appellate courts of other states have ruled on this question. In Kondzer v.

Wayne County Sheriff, 219 Mich. App. 632, 558 N. W. 2d 215 (1996), the Michigan Court of Appeals considered an independent civil action wherein a bail bond surety had sued a county sheriff and judges for breach of contract seeking to set aside a $50,000 bond forfeiture in a separate criminal case before another judge. The lower court entered an order of forfeiture and the surety appealed. In the civil court below, the Twentieth District Court judges and the local sheriff contended that the independent action was invalid because all forfeiture relief must be sought back before the original criminal court where the defendant had violated his bail provisions. The Court of Appeals of Michigan rejected that argument, holding:

> "Defendants claim that plaintiffs are precluded from relief because they failed to seek redress in the proper forum. Their argument is that plaintiffs should have sought relief in the criminal forum that tried Wilke's case, and not brought a civil action for breach of contract. However, as stated in 8 Am.Jur. 2d, Bail and Recognizance, Section151. p. 688:
> An action by the state or federal government on a criminal bond is civil, not criminal, in nature. The action does not involve the guilt or innocence, conviction or acquittal, or any persons; though it may be a proceeding arising in a criminal case, it is in no sense a continuation of the criminal proceedings in which the bail bond was given.
> For example, forfeiture proceedings may be brought by the government in the nature of the common-law action of debt and may be pursued in any court of competent jurisdiction. Id. at Section 150, p. 687. Therefore, although more commonly done so, we find that it was not necessary for plaintiffs to seek relief in the criminal court that tried Wilke. Although originating in and arising out of a criminal case, this proceeding was brought as a civil action for breach of contract in a court of competent jurisdiction.
> We decline to preclude plaintiffs from relief." Id at 558 N.W. 2d at 219.

Although the underlying issue in Kondzer involved subsequently imposed terms of release and was not a simple failure to appear, the Michigan statutes appear to be identically silent on the issue of whether an independent civil action can supplement, succeed or substitute

for the typical criminal court motion for relief of a bond forfeiture. As noted by the Michigan court, the "commonly done" procedure of filing a motion in the criminal case, neither creates the preclusion of other civil proceedings nor affirms an exclusive criminal appeal only process.

A comparison of Idaho Code Section 19-2927 and the Michigan bail statutes also supports the Appellant's position. As quoted above, the Michigan appeals court does not cite any specific local statutory language in concluding that a forfeiture contest may be brought as an independent civil action. Like Idaho, the Michigan laws are silent on the question. The Kondzer opinion was issued November 1, 1996. The Wayne County Prosecutors office had moved to revoke and forfeit the bond on April 9, 1994. From May 1, 1994 onward, the Michigan Compiled Laws provision covering the setting aside of forfeitures read as follows:

M.C.L.A 7.65.15

> Forfeiture or discharge of bond or bail; setting aside forfeiture; disposition of security
>
> Sec. 15. (1) If bond or bail is forfeited, the court shall enter an order upon its records directing the disposition of the case, check, or security within 45 days of the order. The treasurer or clerk, upon presentation of a certified copy of such order, shall dispose of the cash, check, or security pursuant to the order. The court shall set aside the forfeiture and discharge the bail ro bond, within 1 year from the time of the forfeiture judgment, in accordance with subsection (2) if the person who forfeited bond or bail is apprehended, the ends of justice have not been thwarted, and the country has been repaid its costs for apprehending the person.
> (2) If bond or bail is discharged, the court shall enter an order with a statement or the amount to be returned to the depositor. If the court ordered the defendant to pay a fine, costs, restitution, assessment, or other payment, the court shall order the fine, costs, restitution, assessment, or other payment collected out of cash bond or bail personally deposited by the defendant under this chapter, and the cash bond or bail used for that purpose shall be allocated as provided in section 22 of chapter XV. Upon presentation of a certified copy of the order, the treasurer or clerk having the cash, check or

> security shall pay or deliver it as provided in the order to the person named in the order or to that person's order.

Thus, it can be seen that the Michigan statute too was silent on the proposition of whether or not an independent civil action could be maintained in lieu of the generally prescribed criminal motions and appeals. This would suggest that the Michigan ruling was made upon a situation precisely analagous to the concepts expressed in Idaho Code Section 19- 2927.

As in Michigan, this action seeking equitable relief is civil in nature, does not involve the guilt or innocence of any person and is not a continuation of a criminal appeal in which the bail bond was posted. Using the same reasoning, the text of the Idaho law should not be held by this Court to foreclose an independent action of the type Sun Surety brings here. The Respondents' argument of exclusively by statutory silence is not compelling.

III.

SIGNIFICANTLY, IN 2008, A PROSECUTOR'S INDEPENDENT CIVIL ACTION WAS REQUIRED TO ENFORCE A SURETY BOND AND IMPLIES SUCH RELIEF FOR A SURETY.

Since July 1, 2009, amended language in Idaho Code Section 19-2927 has provided specifically that forfeitures shall be enforced by a motion filed before the court which ordered the forfeiture. However, at the time of the November, 2008 failure to appear and the early 2009 denials to grant Sun Surety relief, the collection process on a surety bond was handled differently:

> "19-2928. Enforcement of forfeiture. If the forfeiture is not discharged, as provided in the last section, the prosecuting attorney may at any time after ninety (90) days from the entry upon the minutes, as provided in the

> last section, proceed by action in the name of the county, against the bail upon their undertaking." (legislative history omitted)

Thus, at the time of the Bailey proceedings, the Idaho Legislature not only contemplated, but mandated, that independent civil actions would be undertaken by the State in the process of enforcing that right to collect on a violated surety bond. Nothing about the existence of discretionary judgments exercised by a criminal trial court judge precluded such a collection framework. The work of enforcement was to be entrusted to a separate civil jurist.

As statutes do control on this topic of law, so does the right to enforce necessarily include a corollary right to defend from the enforcement of a surety bond claim. Must such an affirmative defense only be pled in response? It is just such a defense by independent action which Sun Surety has brought here, without waiting for the prosecuting attorney to file an action as the statute then contemplated when this claim arose. Although the Respondent would dismiss this implication, the Appellant urges that the enforcement procedure codified in Idaho Code Section 19-2928, as then in effect, also implies that the right to an independent civil defensive proceeding also exists.

IV.

THIS MATTER HAS NOT BEEN FINALLY DETERMINED AND SHOULD NOT BE FORECLOSED, AS MEASURED BY THE APPLICABLE RES JUDICATA TESTS

The question of finality presented here is whether two dismissals of a motion without prejudice, without hearing, and never reaching any substantive issue shall be considered by this Court as a final judgment for claim preclusion purposes. Ticor Title Company v. Stanion, 144 Idaho 119, 157 P 3d 613 (2007) The Respondent cites two Idaho cases to urge and support the dismissal

by Judge Schilling (Respondents Brief, page 20). They are distinguishable.

In C. Systems, Inc. v. McGee, 145 Idaho 559, 181 P 3d 485 (2008) subsequent litigation between a corporation and its former director seeking diverted assets was dismissed three years after a nearly identical action had proceeded to final summary judgment before the District Court. In the earlier case, affidavits claimed "assets" were transferred to Imbris, Inc., and Sabrecoss, Inc., without authorization of the directors. In the later litigation, the pleading alleged that "assets" were diverted from C Systems to Sabrecross and that "customer checks" were transferred to Imbris bank accounts without authorization. The court held that the former unappealed order was final and barred the second action.

As distinguished from Sun Surety's situation, a nearly identical claim was both pled and heard to a judgment upon the merits in the earlier C-Systems case. It was both this identity of issues and the actual judicial consideration of facts, sought twice, that gave rise to the appellate ruling therein. In that well-developed context, an unappealed, prior summary judgment order was sufficiently final to bar later-attempted litigation. While Sun Surety did not appeal, here no order except those "without prejudice" was ever entered, and no pleading or presentation of the defective notice issue was ever allowed, and no hearing was held.

Also asserted by the Respondent is the precedent of Gerken v. Davidson Grocery Company, 50 Idaho 315, 296 P. 192 (193) for the proposition that a "judgment unappealed from stands as a solemn adjudication . . . (which) can not now be attached". (Respondent's Brief, page 20)

Arising in a battle between, buyers, sellers and mortgage companies, in a quiet title action, that noble rule in Gerken is not particularly insightful as to our facts or procedural situation. Sun Surety acknowledges its failure to appeal the earlier rulings by Judge Neville. However, as urged

above, such an appeal in the criminal court should not preclude an independent action filed within the applicable statute of limitations, if the Neville rulings do not constitute a final judgment for preclusion purposes.

The Appellant has cited at pages 20 through 22 of its brief, both Texas and Minnesota cases in which appellate courts held that dismissals "without prejudice" should not be the basis for final judgment Res Judicata preclusion. It appears to be an issue of first impression in Idaho.

In this State, since the 2007 decision, the Ticor requirement of a "final judgment" does not appear to have been further explained or expanded in any fashion useful here. In Storey Construction v. Hanks, 148 Idaho 401, 224 P3d 468 (2009) the court regarded an order confirming an arbitration award as a final judgment. In Wernecke v. St. Maries Joint School District #401, 147 Idaho 277, 207 P3d 1008 (2009) this Court noted that by specific operation of workers compensation law, decisions of the Industrial Commission are final judgments only as to those claims actually adjudicated below. Thus, no preclusion would attach to new issues later raised in that type of proceeding. The question of what is a final ruling post Ticor is otherwise undeveloped.

This Court should now hold, upon the unique circumstances presented by Sun Surety, that the preliminary, "without prejudice" dismissals of Judge Neville do not constitute a final judgment herein.

V.

JUSTICE SHOULD NOT REQUIRE OR PERMIT FORFEITURE

The two prong test for granting or reviewing on appeal the award of summary judgment requires the Court to find that there is no material issue of fact in dispute and that the moving party is entitled to a judgment as a matter of law. Idaho Rule of Civil Procedure 56(c). There are no

genuine issues of material fact in this case, because the State did not oppose the verified pleading and affidavits which alleged both a defect in the clerk's notice and a gross inequity should the bail bond company be compelled to pay $150,000 for the brief absence of a defendant who was promptly returned to the Court. This factual equity favoring the Appellant is further buttressed by the rule that all facts must be viewed in the light most favorable to the non-moving party by both the trial judge and the reviewing court. Ticor Title Company vs. Stanion, supra

Although Judge Schilling did not get to the merits of the matter, he noted the compelling nature of the facts as dicta in his order.

It is the second portion of the Rule 56 test which this case presents most squarely to the Court: Is the Respondent entitled to a judgment as a matter of law? The Fourth District Court would be compelled to contend and demonstrate that the Clerk's notice was not defective, should a hearing or trial be held on the issue. Judge Schilling never addressed the merits or equities of the matter, as he viewed as dispositive the Respondent's entitlement to claim preclusion. However, neither the broad sweep of the Ticor Title Company case nor other interpretations of Res Judicata by this Court necessarily compel that conclusion. The ancient legal adage "Equity abhors forfeitures" in court is a truism which should be applicable here. This Court has favorably cited that proposition. Graves v. Cupic, 75 Idaho 451, 456, 272 P 2d 1020 (1954) (overruled on other issues by Benz v. D.L. Evans, 152 Idaho 215, 268 P3d 1167 (2012) That concept should guide this Court in its critical analysis of the threshhold issue of whether Res Judicata allows a hearing before the District Court on the equitable and discretionary issue of forfeiture. Measured together with this Court's rule that the primary purpose of bail is simply to ensure a defendant's presence in court, justice mandates a hearing. See State v. Quick Release Bail Bonds, 144 Idaho 651 (App), 167 P3d 788 (2007).

C.

THE COURT SHOULD DENY RESPONDENTS' REQUEST

FOR ATTORNEYS FEES ON APPEAL.

This appeal presents the novel question for Idaho of whether an independent civil action may seek relief from a criminal case bond forfeiture. It asks for further clarification of the rules of res judicata, especially the final judgment rule.

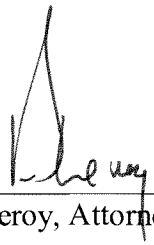
The Respondent seeks fees and costs on appeal, politely characterizing the Appellant's efforts herein as "without foundation." While it is true that no substantial body of Idaho precedent is citable in which independent actions have sought subsequent bail forfeiture relief, some logic and great equities do underlie this appeal. It is simply an Idaho case of first impression. Michigan case law suggests this action may be held properly founded and Idaho decisions suggest litigants are entitled to a final judgment on such questions. This Respondent was effectively and consistently denied a ruling to review the merits of the forfeiture herein, despite the filing of two motions seeking said relief. The $150,000 proposed for imposition is "punitive," under the circumstance of the nearly immediate return to custody of Mr. Bailey. This appeal is "founded" and properly before the Court, even if procedurally unconventional.

D. CONCLUSION

For each and all of the above stated reasons the Appellant asks this Honorable Court to deny the Respondents' request for fees and costs and to reverse and remand so as to allow consideration of the equitable forfeiture relief sought herein in the District Court below.

RESPECTFULLY SUBMITTED:

DATED This 23 day of November, 2012.



David H. Leroy, Attorney for the Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of November, 2012, I caused two true and correct copy of the foregoing Appellant's Reply Brief to be sent by U.S. Mail to the following:

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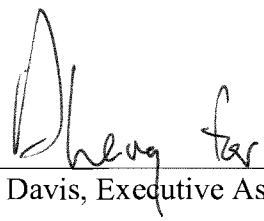

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